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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-105

DHX, INC.
v.
MATSON NAVIGATION COMPANY AND SEA-LAND SERVICE, INC.

Decided: May 9, 2003

DHX, Inc. (DHX), a freight forwarder, has filed a complaint challenging the reasonableness of certain rates and practices of two water carriers in the noncontiguous domestic trade between the United States mainland and Hawaii. The carriers are Matson Navigation Company (Matson) and Sea-Land Service, Inc., now SL Service, Inc. (SL) (defendants). We served a decision in this proceeding on December 21, 2001 (December 2001 decision), denying defendants' motions to dismiss the complaint. A subsequent decision served on March 28, 2002, directed DHX to file an amended complaint, and set a procedural schedule. DHX filed its amended complaint on April 29, 2002. Both Matson and SL filed answers.

This decision denies a motion filed by DHX seeking an order directing Matson to submit more definite responses to 50 of the answers that it filed to the amended complaint; grants a motion filed by SL seeking dismissal of two counts of the amended complaint; and provides a 45-day period for the parties to complete outstanding discovery matters before restarting the procedural schedule.[1]

BACKGROUND

In its original complaint, DHX primarily focused on the reasonableness of rate increases involving defendants' tariffs for the ocean transportation of weight-rated, dry commodities shipped in containers. Under these tariffs, charges are assessed for a single ("stand-alone") container on the basis of the per-100-pound rate for the commodity, subject to a minimum weight requirement that varies depending on the size of the container. The effect of the minimum weight provision is that shippers whose freight does not meet the minimum weight specified in the tariff would, in effect, pay a rate that is higher than the per-100-pound rate established in the tariff for their commodity.

[1] The procedural schedule was suspended pending further order of the Board in a decision served on June 6, 2002.

These tariffs, however, also contain special rules for so-called "overflow" containers. Under the overflow rule, a partially filled container is deemed an overflow container if it is shipped by the same shipper, on the same vessel/voyage, as a full container. The charge for the overflow container is likewise determined by applying the per-100-pound rate listed in the tariff to the actual weight of the commodity, but the overflow container is subject to a flat (not weight-related) minimum charge that varies depending on the size of the container. Because the flat minimum charge for the overflow container is generally less than the weight-based minimum charge for a stand-alone container, shippers can pay a lesser charge than would be applicable if there were no overflow provision.

In the original complaint, DHX argued that defendants had implemented increases in overflow rates that exceeded the statutory zone of reasonableness (ZOR) specified in 49 U.S.C. 13701(d)(1).[2] In the December 2001 decision, slip op. at 5, we cautioned DHX that it could not win its complaint relying solely on the argument that increases to the overflow rates exceeded the ZOR. Thus, we instructed DHX that, to support a rate reasonableness complaint, it would have to indicate which particular multi-container rates it was challenging and show why those rates, if outside of the ZOR, were unreasonable. Id. We also explained that, although DHX had framed its case as principally a rate case, it appeared to us that the gravamen of the complaint was its allegation that Matson and SL had engaged in unreasonable practices in an effort to put consolidators such as DHX out of business.[3] December 2001 decision, slip op. at 6. Finally, we stated that DHX would have to support with particularity its general claim that the carriers' practices were unlawful. December 2001 decision, slip op. at 1.

The specific claims in the amended complaint are set forth in three parts: Part I consists of 9 counts against Matson; Part II consists of 6 counts against SL; and Part III consists of a single joint count against defendants.

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[2] Under 49 U.S.C. 13701(d)(1), "a rate or division of a . . . water carrier for port-to-port service in [noncontiguous domestic] trade is reasonable if the aggregate of increases . . . in any such rate or division is not more than 7.5[%] above . . . the rate or division in effect 1 year before the effective date of the proposed rate or division."

[3] As a freight forwarder, DHX maintains the dual status of carrier (vis-a-vis its shippers) and shipper (vis-a-vis the underlying carrier it uses). See Exem. of Freight Forwarders From Tariff Filing Requir., 2 S.T.B. 48, 50 (1997). Thus, with respect to the tariffs at issue here, DHX is a shipper entitled to take advantage of the overflow provisions and to challenge the carriers' rates as unreasonably high. In its capacity as a carrier, DHX attempts to help its customers take advantage of the most favorable rate by assembling and consolidating, for a charge, the traffic of several shippers into mixed containers. Thus, DHX competes with the defendants for traffic that defendants could themselves solicit.

MOTION TO MAKE ANSWERS MORE DEFINITE

DHX seeks a Board order directing Matson to submit more definite responses to certain averments in the amended complaint. The specific answers that DHX complains about fall into two categories: (1) 50 separate paragraphs involving Matson's tariffs,[4] where Matson generally answered that the content of the tariff speaks for itself; and (2) Paragraph Nos. 76, 77, and 78, where DHX claims that the responses do not clearly articulate Matson's position on the matter.

Pursuant to 49 CFR 1111.4(d), "[a]verments in a complaint are admitted when not denied in answer to the complaint." DHX argues that the response that a document "speaks for itself" is neither an affirmative answer nor a denial, and that Matson's answers to Paragraph Nos. 76, 77, and 78 do not clearly articulate Matson's position and could be construed as both an admission and a denial. Therefore, DHX seeks: (1) an order requiring Matson to fully respond to the 50 cited averments; and (2) a finding that the averments of Paragraph Nos. 76, 77, and 78 stand as admitted unless Matson demonstrates that such averments are untrue.

In reply, Matson submits that DHX's assertions are without merit. According to Matson, it pointed out in its general answer section that various paragraphs are stated in the present tense, in the past tense without identifying the intended time period, or refer to an undefined period of time of unspecified duration. Because its tariffs are always subject to review, revision and modification over time, Matson generally answered that, "what a particular tariff provision says at a certain point in time is conclusively determinable by direct reference to the tariff provision itself in effect at that time."[5] Matson also generally denied all descriptions or characterizations of its tariffs that do not accurately reflect the actual terms of such tariffs. Under the circumstances, Matson submits that its answer that the content of the tariff speaks for itself clearly fulfilled the purpose of fairly responding to DHX's assertions by directing DHX to the relevant tariffs.[6]

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[4] The specific paragraphs are Nos. 25-28, 30, 32-34, 39-52, 54, 70, 82-86, 95-97, 104, 105, 117-121, 134, 138, 156, 162-166, 171, 180, and 185.

[5] Matson submits that DHX is free, in its evidentiary submission, to try to draw whatever inferences and frame whatever arguments it can from the provisions of Matson's tariffs. The purpose of the initial pleadings, according to Matson, is to identify, clearly and simply, the facts upon which the complaint is based and the extent to which the defendants contest those facts. Matson asserts that the only appropriate alternative response to DHX's allegations would be for Matson to simply quote back the actual language of the tariff itself.

[6] Matson also notes that it provided Tariff 2034-E to DHX in discovery, and that the other

(continued...)

Regarding its answers to Paragraph Nos. 76, 77, and 78, Matson states that these paragraphs pertain to things that Matson allegedly did, or did not do, "at all times material to this complaint," with respect to issuing bills of lading, issuing freight invoices, and identifying through routings. Because these paragraphs allege facts without reference to a fixed, identified period of time, Matson states that its answer to each of these paragraphs was: "Matson cannot fully admit or deny the allegations of this paragraph because the amended complaint fails to explain what is meant by the phrase 'at all times material to this complaint.' Matson admits the allegations of this paragraph as of the present time."

Matson also argues that DHX's assertion that the time period applicable to those paragraphs should somehow have been inferred from later, unrelated portions of the amended complaint is baseless. Under the circumstances, Matson submits that it would have been fully within the bounds of fair pleading to simply state its objections to the vague allegations of the paragraphs and leave its response at that. In an effort to fairly answer the allegations of those paragraphs, to the extent possible, Matson submits that it provided a substantive response to each one with respect to the state of affairs at a time that Matson could reasonably identify–namely, the present. Thus, Matson submits that there is no basis to conclude that its answers to these paragraphs violated its obligation to fairly respond to the amended complaint, and no basis for requiring it to do more now.

We agree with Matson that its answers were responsive to the averments in the amended complaint. The first 50 averments that are the subject of the motion generally recite tariff terms and they lack specificity as to the time period involved. Thus, given the discussion of problems outlined in Matson's general answer, Matson's statement that the tariff speaks for itself was responsive. Matson's answers regarding Paragraph Nos. 76, 77, and 78 are also responsive given that the phrase "at all times material to this complaint" is not defined in the amended complaint. Under the circumstances, the motion to make answers more definite will be denied.

MOTION TO DISMISS

SL filed a motion seeking dismissal of two counts in the amended complaint: Count 2 in Part II; and the joint Count in Part III. Both DHX and Matson replied to the motion to dismiss.

Under 49 U.S.C. 14701(b), we may dismiss a complaint that does not state reasonable grounds for investigation and action. See Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104 (STB served Dec. 10, 1999). Also, a complaint may be dismissed without holding an evidentiary hearing where the issues involved are essentially legal. See ZoneSkip, Inc. v. UPS, Inc. and

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[6](...continued)
two, Tariffs 14-F and 2016-D, are available on Matson's website.

UPS of America, Inc., 8 I.C.C.2d 645 (1992), aff'd mem. 998 F.2d 1007 (3d Cir. 1993). Finally, a complaint will be dismissed if there are no material issues of fact to be resolved in the proceeding. Caribbean Shippers Association, Inc. v. NPR, Inc., and the Adherence Group, Inc., STB Docket No. WCC-100 (STB served Mar. 25, 1997), aff'd sub nom. Caribbean Shippers Ass'n., Inc. v. Surface Transp. Bd., 145 F.3d 1362 (D.C. Cir. 1998). In considering a motion to dismiss, we must construe factual allegations in a light most favorable to complainant. See, e.g., Sierra Pacific Power Company and Idaho Power Company v. Union Pacific Railroad Company, STB Docket No. 42012 (STB served Jan. 26, 1998).

Preliminary Matter.

One of DHX's claims is that SL has represented to the public that it was doing business as CSX Lines, LLC (CSXL) since January 2000. DHX asserts that this representation is misleading and untrue because SL and CSXL are two separate and distinct legal entities. According to DHX, the majority of SL's assets, including its corporate name, equipment, ships, terminal operations, and corporate headquarters, were sold to A.P. Moller-Maersk Line on December 10, 1999; SL's business and operations were transferred to a new and separate company known as CSXL; and SL ceased operating some time between December 10, 1999, and January 24, 2000. Moreover, DHX asserts that CSXL: (1) began its own business and operations in January 2000; (2) notified SL's shippers that their interchange agreements with SL would be "null and void" effective January 24, 2000; and (3) required that the shippers enter into new interchange agreements with CSXL. However, DHX submits that CSXL did not file its own tariff until June 14, 2001, when STB SEAU 468 was reissued as STB CSXL 468 based upon a "name change" from Sea-Land Services, Inc. Thus, DHX argues that, despite SL's assertion that STB CSXL 468 is a continuation of SL's tariff STB SEAU 468, the facts show that CSXL operated without a tariff from January 2000 until June 14, 2001.

We disagree. When tariff STB SEAU 468 was cancelled on May 14, 1999, the cancellation supplement indicated that the electronic version of the tariff would apply for future rates and provisions. Effective December 6, 1999, the carrier name section of the title page of the electronic tariff was amended to indicate "Sea-Land Service, Inc. (also doing business as CSX Lines, LLC)." Subsequently, effective January 5, 2000, Rule 110 of the tariff was amended to indicate that the term "carrier" means "Sea-Land Service, Inc. (also doing business as: CSX Lines, LLC) or any other Participating Carrier." Finally, effective June 14, 2001, the title page of STB SEAU 468 was amended to indicate that the tariff was cancelled and reissued as STB CSXL 468 due to a name change to CSXL. Under the circumstances, we cannot find that CSXL operated without a tariff from

January 2000 until June 14, 2001, as alleged, or that STB SEAU 468 was not in effect between May 14, 1999, and June 14, 2001.[7]

Part II, Count 2.

In Part II, Count 2 of the amended complaint, DHX alleges that SL/CSXL is engaging in an unreasonable practice in maintaining conflicting rules of cargo and freight classification and mixed shipment provisions. DHX asserts that Item 640, Sections 1 and 3 of the National Motor Freight Classification (NMFC) STB NMF 100-V and reissues thereof (which require that mixed shipments be rated and charged for at the actual weights of the separate articles), conflict with, and take precedence over, Rule 882 of tariffs STB SEAU 468 and STB CSXL 468 (which subjects overflow containers to a flat, minimum charge that varies depending on the size of the container). Thus, DHX argues that it has been damaged in the amount of the difference between the amounts it paid and the charges that would have been incurred had its overflow cargo been properly rated based upon the actual weight of the cargo shipped.

SL argues that DHX's allegations are factually incorrect on their face and that Part II, Count 2 must be dismissed. SL submits that DHX's allegation that SL's tariffs are "subject to and governed by" the NMFC is apparently rooted in Rule 100 of STB CSXL 468 (and STB SEAU 468 before that), which states, as pertinent, that:

> To the extent indicated in individual rules or rate items specified, this tariff is governed by the tariffs (including supplements thereto or reissues thereof) listed below:
>
> > National Motor Freight Classification NMF 100-V, ICC NMF 100-V, Martin E. Foley, Issuing Officer.

SL argues that, under the plain text of this rule, the NMFC is applicable to those specific rules or rates in which it is specifically mentioned as having some governing influence. SL points out that the NMFC is not incorporated by reference into the text of Rule 882, is not mentioned anywhere in the text of Rule 882, and has absolutely no relevance to the interpretation or the meaning of Rule 882. Thus, SL asserts that DHX's factual predicate for Part II, Count 2 is incorrect, as demonstrated from documents that are matters of public record.

Our examination of tariffs STB SEAU 468 and STB CSXL 468 confirms that there is no specific reference to the NMFC in Rule 882. Thus, we agree with SL that the NMFC terms would not

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[7] DHX's argument that we may not take official notice of the tariffs maintained by SL and its successors is without merit.

apply and take precedence over Rule 882 and that DHX cannot establish any set of facts which would entitle it to the relief sought in Part II, Count 2.[8] Under the circumstances, we will grant SL's motion to dismiss Part II, Count 2.

Part III.

SL asserts that, although Part III of the amended complaint contains allegations of conspiracy, price fixing, and collective activity between defendants, it does not describe a violation within the Board's authority under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Pub. L. No.104-88, 109 Stat. 803 (ICCTA). According to SL, DHX has made numerous allegations under an "unreasonable practices" rubric that are matters that should be decided by a court, if DHX wishes to pursue these claims.

In reply, DHX argues that SL has misconstrued Part III by contending that it is a claim for "conspiracy and collective activity." On the contrary, DHX states that this part of the amended complaint raises issues of unreasonable rates, not unreasonable practices. DHX contends that the rates afforded by defendants to forwarders such as DHX are approximately 50% higher than the rates effectively available to shippers that own their cargo. Moreover, DHX argues that these shipper-specific rates, as well as other unfiled rates, are the true "market" rates. Thus, DHX asserts that it may attack these rates as unreasonable not only on the basis that there is a lack of service and price competition between defendants, but on rate comparison grounds as well. To support its unreasonable rate claim, DHX submits that it has raised the market failure elements set forth in Georgia-Pacific Corp.–Pet. for Declar. Order, 9 I.C.C.2d 103 (1992), reconsidered, 9 I.C.C.2d 796 (1993), applied, 9 I.C.C.2d 1052 (collectively, Georgia-Pacific), aff'd sub nom. Oneida Motor Freight, Inc. v. Interstate Commerce Com'n., 45 F.3d 503 (D.C. Cir. 1995).[9]

Matson also opposes SL's motion to the extent that it seeks dismissal of Part III. Matson argues that, although DHX's claim is baseless on the merits, the alleged unlawful activity described in

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[8] In reply, DHX asserts that SL has not properly and fully disclosed the relationship between Rule 882 and Rule 645 (another tariff rule which also applies to mixed shipments). The relationship between Rule 882 and Rule 645, which is being addressed in Part II, Count 1, is not discussed in the context of the allegation in Part II, Count 2 (i.e., that Item 640 of the NMFC conflicts with, and takes precedence over, the overflow provisions of Rule 882), and in any event, has nothing to do with the NMFC issue.

[9] Under the standard in Georgia-Pacific, rate reasonableness in certain motor carrier undercharge cases may be determined by comparing the challenged rate with the rates within a market-based cluster of price/service alternatives available at the time the shipment moved.

Part III falls within the Board's exclusive jurisdiction, pursuant to 49 U.S.C. 13701(a), to determine the reasonableness of water carrier rates and practices.

Under 49 U.S.C. 13701(a), a rate, classification, rule, or practice relating to transportation by or with a water carrier in noncontiguous domestic trade must be reasonable. A complaint alleging a violation of that requirement may be filed with the Board under 49 U.S.C. 13701(c), and, if we find a violation, we shall prescribe an appropriate rate, classification, rule, or practice pursuant to 49 U.S.C. 13701(b).[10] Here, DHX states that Part III of the amended complaint raises issues of unreasonable rates, not unreasonable practices, and that it intends to pursue its unreasonable rate claims based on the type of market cluster analysis set forth in Georgia-Pacific. However, the Georgia-Pacific standard was developed solely to determine the reasonableness of motor carrier rates for past shipments by defunct carriers by looking at the rates of several other carriers in the market. Here, DHX wants to compare rates that one shipper pays to a carrier with those paid by another shipper to the same carrier. Thus, even if Georgia-Pacific were applicable in the noncontiguous domestic trade,[11] DHX's approach appears to be no more than a broad-ranging allegation that all of defendants' rates are discriminatory. But the discrimination remedy was repealed as to this trade in ICCTA. Thus, DHX cannot possibly prevail in its argument that the assailed rates are unreasonable even if it did show that different shippers pay different rates for arguably similar services. See Government of the Territory of Guam v. Sea-Land Service, Inc., American President Lines, Ltd., and Matson Navigation Company, Inc., STB Docket No. WCC-101, slip op. at 5 (STB served Nov. 15, 2001).

We understand Matson's concern that we consider all matters within our jurisdiction, and we are not here finding that claims of collusion and the like could never be relevant in an unreasonable practice case. But DHX itself has conceded that its objection in Part III is to demonstrate that defendants' rates, overall, are unreasonable because they are allegedly discriminatory. Under the circumstances, we cannot find that DHX has established any set of facts which would entitle it to the relief sought in Part III. Thus, construing all facts most favorable to complainant, we cannot say that

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[10] We are in the process of developing an appropriate methodology for assessing rate reasonableness in STB Docket No. WCC-101, Government of the Territory of Guam v. Sea-Land Service, Inc., American President Lines, Ltd., and Matson Navigation Company, Inc..

[11] We should note that, in the Georgia-Pacific proceeding, the Caribbean Shippers Association, Inc. (CSA), expressed concern that the cluster approach should not be used to determine the reasonableness of joint motor-water rates filed by steamship lines in the domestic offshore trade because the water portion of this trade is not highly competitive. In response to CSA's concerns, the Interstate Commerce Commission stated that the market-rate comparison approach was not an all-purpose measure of rate reasonableness and clearly was not intended for use in a market that is not effectively competitive. Georgia-Pacific, 9 I.C.C.2d at 806 and 828.

Part III of the amended complaint states reasonable grounds or a basis on which we can grant the relief DHX seeks. Accordingly, we will grant the motion to dismiss Part III of the amended complaint.

PROCEDURAL SCHEDULE

When the procedural schedule in this proceeding was suspended there were many outstanding discovery disputes. Under the circumstances, it appears that additional time to complete discovery is warranted. Accordingly, we will extend the time for completing discovery until June 30, 2003. After discovery is completed, the parties should confer and propose an appropriate procedural schedule for this proceeding.

It is ordered:

1. DHX's motion for an order directing Matson to file more complete answers is denied.

2. SL's motion to dismiss Count 2 of Part II and the joint count in Part III is granted.

3. The parties shall complete all outstanding discovery matters by June 30, 2003.

4. This decision is effective on its service date.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary